APPENDIX A

BIA decision on continuous physical presence

Decision of the Board of Immigration Appeals

U.S. Department or Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A28 753 481 - Boston

Date: August 10, 1999

In re:

IN DEPORTATION PROCEEDINGS

APPEAL
ON BEHALF OF RESPONDENT:
Howard A. Silverman, Esquire

CHARGE:
Order: Sec. 241 (a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] -
Entered without inspection

APPLICATION:
Suspension of deportation

The respondent has appealed from the Immigration Judge's March 26, 1997, decision pretermitting his application for suspension of deportation under section 244(a) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a). The record will remanded to the Immigration Judge for further proceedings.

The record reflects that the respondent entered the United States on July 19, 1987, and was served with an Order to Show Cause and Notice of Hearing (Form I-22 1) the next day. In her decision, the Immigration Judge found that as the respondent was served with the Order to Show Cause prior to his acquisition of 7 years of continuous physical presence, he was statutorily ineligible for suspension of deportation.

Recently, in *Matter of Nolasco,* Interim Decision 3385 (BIA 1999), this Board concluded that the **stop-time** rule of section 240A(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(d), generally applies to all pending applications for suspension of deportation. See section 203(a) the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105 100, 111 Stat. 2193, 2196 (1997), *amended by* Pub. L. No. 105-139, 111 Stat. 2644 (1997) ("NACARA"). However, unlike the alien in *Matter of Nolasco, supra*, the respondent before us appears to have accrued over 7 years of continuous physical presence following the service of the Order to Show Cause. As the respondent argues on appeal, while the occurrence of an event specified in section 240(d)(1) of the Act ends "any period" of continuous physical presence preceding the event, the statute does not explicitly preclude the initiation of another period of continuous physical presence for purposes of relief. See *Arrozal v. INS,* 159 F.3d 429, 434 n.2 (9th Cir. 1998); *Matter of Nolasco, supra,* at 14-15 (Rosenberg, concurring). Accordingly, we will remand the record to the Immigration Judge for consideration of the respondent's application for suspension of deportation.

ORDER: The record is remanded, to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

/s/ Fred W. Vacca
FOR THE BOARD

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APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision Of The Board of Immigration Appeals

Date: Dec 4, 1999

File: A28 490 861 - St. Louis

In re: GOVINBDHAI MANILAL PATEL

IN DEPORTATION PROCEEDINGS

APPEAL AND MOTION ON BEHALF OF RESPONDENT:
Gene McNary, Esquire
Danna, Soraghan, Stockenberg & McNary, P.C.
150 North Meramec, 4th Floor
St. Louis, Missouri 63105-3907

ON BEHALF OF SERVICE:
Joseph R. Dierkes, General Attorney

CHARGE:
Order: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] - Entered without inspection

Lodged: Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)]- Nonimmigrant - remained longer than permitted

APPLICATION:
Asylum; withholding of deportation; suspension of deportation

The respondent's appeal from the denial of his application for asylum and withholding of deportation will be dismissed. The Immigration Judge's decision accurately sets forth the facts asserted by the respondent in support of his claim for asylum and withholding of deportation, applies the appropriate legal standards, and correctly concludes that the respondent failed to establish persecution or a well-founded fear of persecution on account of one of the five grounds enumerated in section 101(a)(42) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42). In addition, the respondent's motion to remand his case to the Immigration Judge will be denied because he failed to show that he is prima facie eligible for the relief he seeks.

The respondent bears the evidentiary burdens of proof and persuasion in any application for asylum or withholding of deportation. *Matter of B-*, Interim Decision 3251, at 6 (BIA 1995). An applicant for asylum must establish that he meets the "refugee" definition of section 101(a)(42)(A) of the Act. Specifically, he must be "unable or unwilling to return to, and . . . unable or unwilling to avail himself . . . of the protection of his country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 101(a)(42)(A) of the Act; *Matter of S-P-*, Interim Decision 3287 (BIA 1996); 8 C.F.R. § 208.13. In meeting this burden, an asylum applicant must do more than simply show that he was harmed or has a well-founded fear of being harmed. An applicant must demonstrate that the harm was or would be inflicted "on account of race, religion, nationality, membership in a particular social group, or political opinion." *Matter of S-P-, supra*; 8 C.F.R. § 208.13. An applicant for

asylum has established a well-founded fear of persecution if he shows that a reasonable person in his circumstances would fear persecution. *Id.* We agree with the Immigration Judge's conclusion that the respondent failed to meet his burden of proof.

The Immigration Judge also found that the respondent's claim lacked credibility (I.J. at 9). We agree. As the Immigration Judge pointed out, the respondent's answers to the questions posed at the hearing were often evasive and vague. For example, although the respondent claimed to be a leader of the local chapter of the Bhartiya Janta Party (BJP), he was unable to say exactly how or when he rose to that post (Tr. at 75, 115-16). He was also unable to specify the number of beatings he allegedly received in India or tell generally when they occurred (Tr. at 79). Likewise, he was unable to tell when, or how many times, he was allegedly jailed while in India (Tr. at 81-82). The record also reflects inconsistencies between the respondent's application for asylum and his testimony. For example, although his written application for asylum indicates that his wife is still in India, he testified that she came here with him, and that he doesn't know where she is (Exh. 6; Tr. at 13, 66, 70, 105, 107). Our review of the record reveals that (1) the discrepancies and omissions described by the Immigration Judge are actually present; (2) these discrepancies and omissions provide specific and cogent reasons to conclude that the respondent provided incredible testimony; and (3) a convincing explanation for the discrepancies and omissions has not been supplied by the respondent. For these reasons, the Board defers to the Immigration Judge's adverse credibility finding. *Matter of A-S-*, Interim Decision 3336, at 5-7 (BIA 1998); *see also Matter of Y-B-*, Interim Decision

3337, at 4-5 (BIA 1998) (noting that specific, detailed, and credible testimony or a combination of detailed testimony and corroborative background evidence is necessary to prove a case for asylum).

We also note that the respondent's veracity is further damaged by the fact that he filed a fraudulent application for suspension of deportation (Opposition to Motion to Remand, Exh. B). Also, in a May 18, 1996, reply to a Notice of Intent to Revoke a visa petition approval, the respondent's prior attorney admitted that information previously provided by the respondent, including testimony he provided on December 10, 1992, was false (Opposition to Motion to Remand, Exhs. A and B). This letter expressly admits that the respondent misrepresented facts to Immigration officials and that he fabricated 90% of his earlier application for suspension of deportation. We find that this information further diminishes the respondent's credibility and provides a basis for us to have denied his application for asylum in the exercise of discretion.

We also agree with the Immigration Judge's finding that the lack of corroborative evidence diminishes the respondent's claim. *See Matter of S-M-J-*, Interim Decision 3303, at 4 (BIA 1997) (noting that because the burden of proof is on the alien, he or she should provide supporting evidence, if available, both of general country conditions and of the specific facts sought to be relied on, or explain its unavailability); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989). For example, the respondent provided no corroborative evidence regarding his membership in the BJP. In addition, no letters or affidavits from his family or friends were submitted to support his claim. Because the respondent submitted "a sterile application without supporting documents except for

his self-serving statements," the Immigration Judge found that there was insufficient documentary evidence to support his claim. With this evidentiary void in the record, we agree with the Immigration Judge that the respondent failed to meet his burden of proof. *See Matter of M-D-*, Interim Decision 3339 (BIA 1998) (finding that the alien failed to meet his burden of proof where there was a complete lack of evidence to corroborate the specifics of his asylum claim).

Finally, we note that the respondent allegedly fears persecution because he is a Hindu and a member of the BJP. We take administrative notice of the fact that since the time of the respondent's departure from India, the BJP became the dominant and ruling party in India.[1] We also note that the coalition government led by the BJP has now dissolved. However, the fact that the respondent's own party was able to rise to power significantly diminishes the legitimacy of his claim that he fears he will be persecuted on account of that membership if he returns to India. We also find that the reasonableness of the respondent's fear is diminished by the fact that his family has apparently remained unharmed in India since his departure. *See Matter of A-E-M-*, Interim Decision 3338 (BIA 1998) (noting that the reasonableness of an alien's fear of persecution is reduced when his family remains in his native country unharmed for a long period of time after his departure). For these reasons, because we are in agreement with the decision of the Immigration Judge, and because we are not persuaded by any of the respondent's arguments on appeal, the appeal will be dismissed.

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[1] The Board can take administrative notice of recent or changed country conditions. *Matter of S-M-J-*, *supra,* at 9, n.2 (BIA 1997).

The respondent has also filed a motion to remand his pending appeal to the Immigration Judge for consideration of his application for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1). Suspension of deportation requires, among other things, a period of 7 years continuous physical presence in the United States. In *Matter of Nolasco*, Interim Decision 3385 (BIA 1999); we determined that, with certain exceptions not relevant in this case, the provision for calculating continuous physical presence in section 240A(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(d) (Supp. 11 1996) (the "stop time rule"), applies to applications for suspension of deportation. Therefore, the respondent's period of continuous physical presence ended at the service of the Order to Show Cause (OSC). The respondent claims to have been physically present in the United States since September 8, 1989, and an OSC was served in the respondent's case on April 6, 1990. Because the OSC was served before the respondent acquired 7 years of physical presence in the United States, the respondent cannot meet the physical presence requirement for suspension of deportation. *Matter of Nolasco, supra.*

As noted above, the respondent previously gave false testimony while seeking an immigration benefit, and he filed a fraudulent application for suspension of deportation. We find that this conduct bars the respondent from establishing good moral character, a requirement for suspension of deportation. *See Matter of R-S-J-*, Interim Decision 3401 (BIA 1999) (noting that for purposes of section 101(f)(6) of the Act, false oral statements under oath to an asylum officer can constitute false testimony); section 101(f)(6) of the Act (stating that no person can be found to have good moral character if he

or she gives false testimony for the purpose of obtaining a benefit under the Act). For these reasons, the respondent's motion to remand will be denied because he failed to establish a prima facie showing that he is entitled to the relief he seeks. *Matter of Gutierrez*, Interim Decision 3286 at 6 (BIA 1996) (noting that "an alien must establish prima facie eligibility for the relief sought before a motion to reopen will be granted"); *see also Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992). For these reasons, the following orders shall be issued.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to remand is denied.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondent shall be deported as provided in the Immigration Judge's order.

/s/ Edward R. Gats
FOR THE BOARD

APPENDIX C

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-1131

Govindbhai M. Patel,
Petitioner,
v.
Immigration and Naturalization Service;
Michael Heston, District Director of the United States Immigration and Naturalization Service;
Janet Reno, Attorney General of the United States,
Respondents.

On Petition for Review from
Immigration and Naturalization Service.
[UNPUBLISHED]

Submitted: November 15, 2000
Filed: November 22, 2000

Before BOWMAN, FAGG, and BEAM,
Circuit Judges.

PER CURIAM.

Govindbhai M. Patel, a citizen of India, entered the United States on September 9, 1989, as a nonimmigrant visitor for pleasure. Although he was authorized to remain in the United States only until March 7, 1990, Patel did not leave. Seven months later, on April 6, 1990, the Immigration and Naturalization Service (INS) issued Patel an order to show cause charging him with

deportability. Seeking to extend his stay, Patel applied for asylum, and an immigration judge denied Patel's application in December 1992. While Patel's appeal was pending, he obtained a work visa by providing false information to the INS. Patel then filed a motion to remand with the Board of Immigration Appeals (BIA) seeking to adjust his status on the basis of his work visa. In reviewing his file, the INS found many discrepancies and concluded Patel had submitted false information.

After accruing seven years of continuous physical presence in the United States, Patel filed a motion to reopen with the BIA seeking suspension of deportation under 8 U.S.C. § 1254(a)(1) (1994), which gives the Attorney General discretion to suspend deportation of an alien who

> has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship.

On September 30, 1996, Congress repealed this provision, replaced it with more limited discretionary relief, and enacted a "stop-time" rule providing that any period of physical presence shall be deemed to end when the alien is served an order to show cause. *See* 8 U.S.C. § 1229b(d)(1)(Supp. III 1997). Congress also provided the stop-time rule applies to orders to show cause issued before the rule's enactment. *See id.* § 1101 note; *Afolayan v. I.N.S.*, 219 F.3d 784, 788 (8th Cir. 2000). We recently held the stop-time rule applies in suspension of deportation proceedings when an order to show cause was

issued before the rule was enacted. *See Afolayan,* 219 F.3d at 788; *Tang v. I.N.S.*, 223 F.3d 713, 719 (8th Cir. 2000).

The Board denied Patel's appeals and dismissed his motions because Patel had not acquired seven years of continuous physical presence before the issuance of the order to show cause, and because Patel could not establish he was a person of good moral character given his false testimony during his asylum hearing and fraudulent application for a work visa. Patel now seeks review of the order denying suspension of deportation under § 1254(a)(1).

Patel argues he qualifies for suspension of deportation because he showed more than seven years' continuous physical presence, good moral character, and extreme hardship. According to Patel, even if the stop-time rule applies to him, he accumulated seven years of physical presence after issuance of the order to show cause. Patel also argues retroactive application of the stop-time rule to him violates his Fifth Amendment right to due process. Patel's arguments involving physical presence and the stop-time rule are foreclosed by our recent decisions in *Afolayan*, 219 F.3d at 788-89, and *Tang*, 223 F.3d at 719. *Accord Angel-Ramos v. Reno*, No. 99-3126, 2000 WL 1346860, at *4-5 (7th Cir. Sept. 29, 2000); *Ayoub v. I.N.S.*, 222 F.3d 214, 215 (5th Cir. 2000) (per curiam); *Rivera-Jimenez v. I.N.S.,* 214 F.3d 1213, 1217 (10th Cir. 2000) (per curiam); *Appiah v. I.N.S.*, 202 F.3d 704, 708-09 (4th Cir.), *cert. denied*, 2000 WL 840068 (U.S. Oct. 2, 2000) (No. 99-10039); *Tefel v. Reno*, 180 F.3d 1286, 1293, 1299-1302 (11th Cir. 1999), *cert. denied*, 120 S. Ct. 2657 (2000). Regardless of the stop-time rule's application, Patel's false testimony before the INS in 1992 precludes him from showing good moral charac-

ter necessary to qualify for suspension of deportation. *See* 8 U.S.C. § 1105a(f)(6) (person who gives false testimony to obtain benefits under immigration law is not of good moral character).

Because Patel lacks the seven years of physical presence and the good moral character needed to qualify for suspension of deportation, we deny Patel's petition for review, and affirm the BIA's decision.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 00-1131

Govindbhai M. Patel,
Petitioner,
v.
Immigration and Naturalization Service,
Michael Heston, District Director of the United States Immigration and Naturalization Service,
Janet Reno, Attorney General of the United States,
Respondents.

Order Denying Petition for Rehearing
and for Rehearing En Banc

The petition for reheating en banc is denied. The petition for reheating by the panel is also denied.

(5128 -010199)

February 15, 2001

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals,
Eighth Circuit